CASE NOS. 18-14163 & 18-14400

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Cross-Respondent)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Cross-Petitioner)

A Petition for Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-221114

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Petitioner hereby provides the following Certificate of Interested Persons and Corporate Disclosure Statement:

1. The name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporation(s), publicly traded entities that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case:

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2. The name of every other entity whose publicly-traded stock, equity, or debt may be substantially affected by the outcome of the proceedings:

None.

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LEGAL ARGUMENT

A. The Board's Answer Brief Mischaracterizes Facts Pertinent to the Resignations of Barlow, Clark, Greenlee, Hickey, Reed and Wrench, and the Termination of Smith

The NLRB's Answer Brief, like the Administrative Law Judge's decision and the Board's affirmance of that decision, consists of a narrative whereby AMS laid off employees in a "cyclical" manner and in conjunction with the phases of its project building dormitories at Bethune-Cookman University. Affected employees who also had worked a sufficient number of days in the preceding twelve or twenty-four months, therefore, were eligible to vote in the 2016 mail-ballot Union election under the agency's Steiny-Daniel formula governing voting eligibility in the construction industry. See, e.g., Answer Brief at 17; Steiny and Co., Inc., 308 N.L.R.B. 1323 (1992); Daniel Constr. Co., 133 N.L.R.B. 264 (1961), as modified 167 N.L.R.B. 1078 (1967). These employees included Jacob Barlow, Jeremy Clark, Forest Greenlee, Dustin Hickey, George Reed and David Wrench, who cast seven of the nine challenged ballots at issue.

Were this narrative supported by substantial evidence in the record as a whole, this Court would be compelled to affirm the ALJ's, and by extension the Board's, overruling of AMS's challenges to the seven ballots. See N.L.R.B. v. Contemporary Cars, Inc., 667 F.3d 1364, 1370 (11th Cir. 2012); N.L.R.B. v. Gimrock Constr., Inc., 247 F.3d 1307, 1309 (11th Cir. 2001); TRW-United Greenfield Div. v. N.L.R.B., 716

F.2d 1391, 1393 (11th Cir. 1983). But it is not supported, as various factual exaggerations and mischaracterizations in the Board's Answer Brief demonstrate. AMS's challenges—asserting that employees Barlow, Clark, Greenlee, Hickey, Reed and Wrench had quit before the end of the Bethune job, and employee Smith had been fired for cause for his poor workmanship—should have been sustained.

More specifically, the Board contends that block-laying work at Bethune, a two-phase project, "gradually diminished" and was nearly completed by January 15, 2016, and that AMS proceeded to reduce its masonry workforce from seventy to forty on that day, to include laying off Smith and Wrench. This initial layoff was followed by a second layoff, just before the project's April 8, 2016, "hit date" for completion of bricklaying, which layoff affected Barlow, Clark, Greenlee, Hickey and Reed. The Bethune project allegedly "essentially concluded" shortly thereafter. Answer Brief, at 14-24. No evidence in the record, however, supports these factual conclusions. Rather, the record, without contradiction, shows the following:

- As of January 2016, not only was there still block work in Phase II left to be done at Bethune, but the Company "needed to put more people on" to handle the Phase II brick work, which was just getting underway (A5: 1046-48). There was, in other words, no layoff at this time.
- While AMS's "hit date" for completion of all block and brick was April 8, 2016, clean-up and punch-list work remained for two months beyond

that date. AMS Operations Manager Marc Carney did not testify "that the [Bethune] project essentially concluded in April 2016." Instead, Carney's testimony was that the conclusion of the work "depended on how far the punch-out went" (A4: 815-16). AMS foreman Todd "Turbo" McNett testified that the Company tried to keep masons employed to accomplish the tasks on the punch list, or sought to move them to other jobs, and that the resignations put the April 8 hit date in jeopardy, placing AMS at the risk of a $25,000.00 per day fine (A4: 652-54, 718-21). Uncontested AMS payrolls for Bethune show masons assigned to "punchout" through mid-June (A7: 54-63).

- The Bethune project formally ended on June 15, 2016, when AMS issued its guarantee and warranty of its work. AMS had masons on the payroll through that week (A4: 865-73, 900-03; A7: 53-63).
- AMS employees left for other jobs not at the end of the Bethune project, but in anticipation of the end of the Bethune project. Per McNett, "[t]hey didn't want to stop working with AMS; they wanted to stay working when [Bethune] was done." (A4: 653).
- Reed did not separate at the same time as Barlow, Clark, Greenlee and Hickey, but roughly two weeks later (A7: 43-44).

Moreover, the Board's reading of the record on related points either is unreasonably strained, or outright wrong. For example, AMS foreman Robert Dutton—who supervised Reed—did not concede that he contemporaneously had characterized Reed's departure as a layoff. Answer Brief at 18. Counsel for the NLRB General Counsel did not even question Dutton on the subject, and, in fact, Dutton's testimony on direct examination was emphatically to the contrary. Dutton testified that (i) Reed quit on April 15, 2016, telling Dutton he had another job to go to; (ii) Dutton contacted the AMS office in Sarasota to inform the Company that Reed had quit; and (iii) AMS's "Reason for Leaving" form, with the "Quit" line checked, accurately reflected Dutton's conversation with the office (A4: 895-97; A7: 44). Nor did AMS classify Barlow's, Hickey's, Greenlee's, and Clark's departures as layoffs in its own personnel records, as the Board contends. Answer Brief at 18. The records in question, Reason for Leaving forms for these employees, all have a checkmark by the word "Quit," followed by a handwritten notation of "VQ" for "voluntary quit" (A7: 43). The forms also have a line for "Lay off," which was unchecked on all of them (A7: 43).

B. The Board's Answer Mischaracterizes Facts Pertinent to the Terminations for Cause of Acevedo and Stevenson

With respect to Acevedo and Stevenson and their safety-related terminations for cause, the NLRB makes several unsupported assertions in its Answer Brief. At the outset, there is nothing in the record supporting the Board's statement that "[t]he

Company did not conduct any general safety orientation, like the one at the Westshore jobsite, for employees at the UT [University of Tampa] jobsite." Answer Brief, at 31. This subject simply was not broached during the ALJ hearing. Continuing, the Board's statement that AMS's disciplinary forms categorized offenses by severity and on a four-point ascending scale ranging from "1" to "FINAL," see Answer Brief, at 34, 48, is similarly not based on evidence adduced during the hearing, and also is patently false: the numbers and word, which follow the phrase "EMPLOYEE WARNING NOTICE" and a colon, are not a progressive rating scale, but instead inform the reader how many warnings the pertinent employee has received. See, e.g., A6: 5; A7: 49. As shown by the record, for a zero-tolerance infraction (like a witnessed violation of AMS's fall-protection rule), the number "1" will be marked, because all such infractions have resulted in termination (A6: 6). Each time a warning notice is filled out for any reason, a Company representative then completes the "ACTION TO BE TAKEN" section in the lower half of the form, with options ranging from a warning to dismissal.

Next, the record contains no evidence that, prior to May 16, 2016, "Acevedo and Stevenson had worked inside at the UT site on scaffolds without harnesses." Answer Brief, at 35. Nor was there any testimony to the effect that employee Timothy Bryant "had worked for months without receiving any safety training at all." Id. at 47. Finally, the Board's argument that McNett harbored anti-union

animus is undermined by its own admission that McNett, when initially informed by another foreman of Acevedo's and Stevenson's failure to wear their safety harnesses at UT, gave the two men a mulligan, replying "tell them it's a good thing I didn't catch them and make sure they get tied off properly." See Answer Brief, at 32. As AMS has argued, the allegations that McNett harbored animus lack support. Furthermore, the testimony of Acevedo and Stevenson—from whence these allegations came—was not credible, in that the two employees contradicted themselves as to whether other employees working inside at UT were wearing harnesses and tied off, and Acevedo, clearly, was searching for any reason to avoid being fired.[1] The record as a whole in this case demonstrates that AMS terminated Acevedo and Stevenson for just cause, and that the ALJ's decision to credit Acevedo and Stevenson over McNett was unreasonable.

C. The Board's Interpretation of the Steiny-Daniel Formula, and Its Treatment of AMS's Efforts to Amend the Excelsior List, Remain Erroneous as a Matter of Law

The Board denies that AMS's later rehire of several of the masons, including Smith, influenced its conclusion that the employees previously had been laid off. Answer Brief, at 24. And indeed, it should not have influenced that conclusion,

[1] The Board admits that Acevedo, upon being caught in his safety violation, lied about not receiving safety training, then claimed applicability of a non-existent OSHA regulation, and finally alleged a connection between the discipline and his Union support. Answer Brief at 35.

because the fact of post-election rehire, under Steiny-Daniel, is not probative on the question of whether an employee had a reasonable expectation of future employment at the time of the election. Cf. Daniel Constr. Co., 133 N.L.R.B. at 267 (formula accounts for former employees who "have a continuing interest in working conditions which would warrant their participation in an election"). But the Answer Brief's denial notwithstanding, the Board repeatedly and erroneously gave weight in its Decision and Order to the rehires, thus fatally compromising it. See A9: 119, at 5 (Smith's testimony as to his alleged layoff "is supported by the Respondent's re-employment of Smith"; testimony of Union business representative concerning Reed's alleged layoff is "supported by the fact that the Respondent did in fact reemploy Reed"; and "in addition to Smith and Reed, the Respondent has since re-employed Greenlee").

Additionally, the Board's assertion in the Answer that the ALJ found that AMS "intentionally [had] omitted names from the [Excelsior] list" fails to include the more-important explanation that the omissions were not made in bad faith, but rather were based on AMS's position that the three employees in question, including Reed and Wrench, either had resigned before the completion of the Bethune job, or had been terminated for cause. AMS and the Union agreed before the election—via a stipulated election agreement approved by the Board—that employees separating for these reasons were to be excluded from the list. Compare Answer Brief, at 7,

with A7: 40, at 1(c) & A8: 111, at 20-22. In general, the ALJ's treatment of the voter list as an irrevocable admission with respect to the eligibility of persons on it to vote in the election (A8: 111, at 5 & nn. 14-16) is contrary to law. See Medline Indus., Inc., 223 N.L.R.B. 627, 657 (1977) ("While not going so far as to say that the Employer is now necessarily estopped from changing its position and that it is cemented to its Excelsior list, it would nevertheless seem that its own affirmative exclusion of [an employee] from the unit is properly a circumstance—in the nature of an admission later retracted or explained—to be considered and given deserved weight in the total situation."). And regardless, the Board, in the portion of its Decision and Order affirming the overruling of the ballot challenges, found it unnecessary to pass on the ALJ's finding of intentional omission (A9: 119, at 1 n.3).

CERTIFICATE OF TYPE SIZE AND STYLE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in fourteen-point font of Times New Roman.

CERTIFICATE OF COMPLIANCE

I certify that this Reply brief complies with the type-volume limitation set forth in Fed. R. Civ. P. 32(a)(7)(B). This brief contains 1,852 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of March, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: David Habenstreit, Assistant General Counsel, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C., 20570, Counsel for Appellee.

I FURTHER CERTIFY that and an original and six copies of the foregoing were transmitted to the Clerk of Court, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia 30303, (404) 335-6100, via Federal Express overnight delivery.

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